

UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION

LIBERTY NATURAL PRODUCTS, INC., )  
 )  
Plaintiff, ) 03:11-cv-00264-HU  
 )  
vs. ) **OPINION AND**  
 ) **ORDER**  
 )  
VALERIE HAWK HOFFMAN, SUNRISE )  
HERBAL REMEDIES, INC., Dissolved, )  
and SAGE ADVICE OF PALM BEACH, )  
INC., Dissolved, )  
 )  
Defendants. )

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Philip F. Schuster, II  
Dierking & Schuster  
3565 NE Broadway Street  
Portland, OR 97232  
(503) 335-7765  
(503) 281-1983 (fax)  
schuster@pcez.com

Attorney for Plaintiff

William D. Brandt  
William D. Brandt, PC  
880 Liberty Street NE  
Salem, OR 97301  
(503) 485-4168  
(503) 364-6735 (fax)  
bill@brandtlawoffices.com

Attorney for Defendants

HUBEL, Magistrate Judge:

This matter comes before the court on plaintiff Liberty Natural Products, Inc.'s (hereinafter, "Plaintiff") motion for partial summary judgment; defendants Valerie Hoffman ("Hoffman"), Sunrise Herbal Remedies, Inc. ("Sunrise"), and Sage Advice of Palm Beach Inc.'s ("Sage Advice") (collectively, "Defendants") cross-motion for summary judgment; Defendants' motion for leave to file a first amended answer; and Defendants' motion to strike various portions of James Dierking's ("Dierking") supplemental declaration and Plaintiff's reply memorandum. The parties have given full consent to adjudication of the case by a magistrate judge pursuant to 28 U.S.C. § 636(c). For the reasons set forth below, Plaintiff's motion (dkt. #33) for partial summary judgment is **GRANTED** in part and **DENIED** in part; Defendants' cross-motion (dkt. #51) for summary judgment is **DENIED**; Defendants' motion (dkt. #72) for leave is **GRANTED**; and Defendants' motion (dkt. #77) to strike is **GRANTED** in part and **DENIED** in part.

#### ***I. FACTUAL AND PROCEDURAL BACKGROUND***

As a preliminary matter, Plaintiff has requested that I take judicial notice of the Complaint, Answer, General Judgment, and Supplemental Judgement from the Clackamas County proceeding. It is well settled that courts "may take judicial notice of court filings and other matters of public record" because they are "readily verifiable and, therefore, the proper subject of judicial notice." *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006). Accordingly, with respect to the aforementioned court filings, Plaintiff's request for judicial notice is granted.

1 Plaintiff has also presented the court with hearing  
2 transcripts from the Clackamas County proceeding. It is not  
3 entirely clear whether Plaintiff is requesting that I take judicial  
4 notice of the hearing transcripts. To the extent Plaintiff is  
5 making such a request, it is denied.

6 On November 6, 2008, Defendant prosecuted two counterclaims  
7 against Plaintiff in a case filed in Clackamas County Circuit  
8 Court. (Schuster Decl. Ex. 2.) Both counterclaims were for breach  
9 of contract. (Schuster Decl. Ex. 2.) Under the first counterclaim,  
10 Defendants sought \$76,400 for allegedly damaged and expired  
11 product, and \$300,000 for the alleged resulting loss of business.  
12 (Schuster Decl. Ex. 2.) The second counterclaim sought \$100,000  
13 based on Plaintiff's alleged sale of Defendants' product known as  
14 "Chill Out." (Schuster Decl. Ex. 2.)

15 On April 13, 2009, Plaintiff obtained a general judgment  
16 against Defendants, which provided, in pertinent part, that:

17 Following closing argument, the court pronounced its  
18 judgment in favor of the Plaintiff against the Defendants  
19 Valerie Hawk Hoffman, Sunrise Herbal Remedies, Inc. and  
20 Sage Advice, Inc., jointly and severally, on its first  
21 claim, in the sum of \$67,466.90, with pre-judgment  
22 interest thereon as set forth hereafter, together with  
23 further judgment in favor of the Plaintiff against the  
24 Defendants Valerie Hawk Hoffman, Sunrise Herbal Remedies,  
25 Inc. and Sage Advice, Inc., jointly and severally, on its  
26 second claim, in the sum \$69,198.20[.]

27 (Schuster Decl. Ex. 3.)

28 On August 11, 2009, a Supplemental Judgment was entered in  
favor of Plaintiff, which stated:

Plaintiff is entitled to an enhanced prevailing  
party fee in the sum of \$5,500, per ORS 20.190. **The  
court finds that Defendants against whom judgment was  
granted herein filed counterclaims and/or defenses that  
were not objectively reasonable** and were filed in an  
effort to gain leverage in settlement negotiations.

1       **The court finds that the same Defendants, through**  
 2       **Valerie Hoffman, repeatedly offered false testimony and**  
 3       **exhibits in trial of this matter.** The court also finds  
 that the Defendants did not act with diligence in trying  
 to settle Plaintiff's claims.

4       **The court, in awarding attorney fees to the**  
 5       **Plaintiff under ORS 20.105, finds that the Defendant**  
 6       **against whom judgment was entered had no objectively**  
 7       **reasonable basis to counterclaim against Plaintiff for an**  
 8       **alleged overpayment of Plaintiff's account.** The  
 9       Defendants did not raise the alleged overpayment in a  
 series of emails between the parties months before trial  
 when Plaintiff's account was being discussed. []  
 10       **Defendant Hoffman at trial fabricated an exhibit to**  
 11       **support the claim of overpayment and testified falsely**  
 12       **regarding it.**

13       (Schuster Decl. Ex. 4) (emphasis added). Based on the court's  
 14       findings, judgment was entered against Hoffman, Sunrise, and Sage  
 15       Advice, but the court denied Plaintiff's demand that the judgment  
 16       be entered against Defendants' counsel under ORS 105.160. (Schuster  
 17       Decl. Ex. 4.)

18       On January 20, 2011, Plaintiff filed the present action  
 19       against Defendants in Clackamas County Circuit Court.<sup>1</sup> Plaintiff  
 20       set forth a single claim for wrongful use of civil proceedings in  
 21       violation of ORS 31.230(1)<sup>2</sup> and sought \$7,058 in damages. On  
 22       February 7, 2011, Plaintiff sought leave to amend its complaint.  
 23       The Amended Complaint requested consequential damages of \$9,367.69

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24  
 25       <sup>1</sup> The following facts are taken from this court's September  
 26       2, 2011 Findings and Recommendation. (Dkt. #16.)

27       <sup>2</sup> "[A] claim for damages for wrongful use of a civil proceeding  
 28       shall be brought in an original action *after* the proceeding which  
 is the subject matter of the claim is concluded." OR. REV. STAT.  
 31.230(3) (2009) (emphasis added).

1 and punitive damages of \$200,000 based on the counterclaims that  
2 Plaintiff argues were wrongfully prosecuted against them.<sup>3</sup>

3 Defendants timely filed their notice of removal in this court  
4 on March 2, 2011. Plaintiff subsequently moved to remand the  
5 proceeding to Clackamas County Circuit Court; however, on September  
6 2, 2011, that motion was denied.

## 7 **II. LEGAL STANDARD**

### 8 **A. Motion for Summary Judgment**

9 Summary judgment is appropriate "if pleadings, the discovery  
10 and disclosure materials on file, and any affidavits show that  
11 there is no genuine issue as to any material fact and that the  
12 movant is entitled to judgment as a matter of law." FED. R. CIV.  
13 P. 56(c). Summary judgment is not proper if factual issues exist  
14 for trial. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir.  
15 1995).

16 The moving party has the burden of establishing the absence of  
17 a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477  
18 U.S. 317, 323 (1986). If the moving party shows the absence of a  
19 genuine issue of material fact, the nonmoving party must go beyond  
20 the pleadings and identify facts which show a genuine issue for  
21 trial. *Id.* at 324. A nonmoving party cannot defeat summary  
22 judgment by relying on the allegations in the complaint, or with  
23 unsupported conjecture or conclusory statements. *Hernandez v.*  
24 *Spacelabs Medical, Inc.*, 343 F.3d 1107, 1112 (9th Cir. 2003). Thus,  
25 summary judgment should be entered against "a party who fails to  
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27 <sup>3</sup> Plaintiff's motion for partial summary judgment indicates  
28 that they are now requesting "a reduced amount of \$5,432.66 as  
consequential damages." (Pl.'s Mem. Supp. Mot. Summ. J. at 4 n.3.)

1 make a showing sufficient to establish the existence of an element  
 2 essential to that party's case, and on which that party will bear  
 3 the burden of proof at trial." *Celotex*, 477 U.S. at 322.

4 The court must view the evidence in the light most favorable  
 5 to the nonmoving party. *Bell v. Cameron Meadows Land Co.*, 669 F.2d  
 6 1278, 1284 (9th Cir. 1982). All reasonable doubt as to the  
 7 existence of a genuine issue of fact should be resolved against the  
 8 moving party. *Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir. 1976).  
 9 Where different ultimate inferences may be drawn, summary judgment  
 10 is inappropriate. *Sankovick v. Life Ins. Co. of N. Am.*, 638 F.2d  
 11 136, 140 (9th Cir. 1981).

12 However, deference to the nonmoving party has limits. The  
 13 nonmoving party must set forth "specific facts showing a genuine  
 14 issue for trial." FED. R. CIV. P. 56(e). The "mere existence of  
 15 a scintilla of evidence in support of plaintiff's positions [is]  
 16 insufficient." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252  
 17 (1986). Therefore, where "the record taken as a whole could not  
 18 lead a rational trier of fact to find for the nonmoving party,  
 19 there is no genuine issue for trial." *Matsushita Elec. Indus. Co.,*  
 20 *Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal  
 21 quotation marks omitted).

#### 22 **B. Motion to Strike**

23 Rule 12(f) provides that "[t]he court may strike from a  
 24 pleading an insufficient defense or any redundant, immaterial,  
 25 impertinent or scandalous matter" on their own initiative or  
 26 pursuant to a party's motion. FED. R. CIV. P. 12(f). Granting a  
 27 motion to strike is within the discretion of the district court.  
 28 See *Fed. Sav. & Loan Ins. Corp. v. Gemini Mgmt.*, 921 F.2d 241, 244

(9th Cir. 1990). Motions to strike are disfavored and should not be granted unless it "can be shown that no evidence in support of the allegation would be admissible." *Pease & Curren Ref., Inc. v. Spectrolab, Inc.*, 744 F. Supp. 945, 947 (C.D. Cal. 1990) (internal quotation marks omitted), *abrogated on other grounds by Stanton Rd. Ass'n v. Lohrey Enters.*, 984 F.2d 1015 (9th Cir. 1993).

### **III. PRELIMINARY PROCEDURAL MATTERS**

#### **A. Leave to Amend**

Pursuant to Rule 15(a), Defendants seek leave to amend their answer to add an affirmative defense of advice of counsel. "Advice of counsel, if sought in good faith and if given after full disclosure of information in the possession of the accuser establishes probable cause as a matter of law," *Hartley v. Water Res. Dept.*, 77 Or. App. 517, 520 (1986), which, in turn, negates an essential element of a claim for misuse of civil proceedings. See *Pereira v. Thompson*, 230 Or. App. 640, 674 (2009) (recognizing one element of a claim for wrongful initiation of a civil proceeding as the "absence of probable cause to prosecute the action.") But to utilize that defense, a defendant must plead it. *Id.* at 675.

In determining whether to grant a motion to amend, the court should consider (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment, and (5) prior amendments to the pleading. *Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351, 355-56 (9th Cir. 1996).

Plaintiff opposes Defendants' motion for leave to amend, arguing that the doctrine of issue preclusion renders amendment futile. It well established that futility alone *can* justify the denial of a motion for leave to amend, but the Ninth Circuit has

1 also repeatedly stressed that the court must remain guided by the  
2 underlying purpose of Rule 15, e.g., to facilitate decision on the  
3 merits, as opposed to procedural technicalities. *Nunes v. Ashcroft*,  
4 375 F.3d 805, 808 (9th Cir. 2004).

5 As discussed further below, neither party in this case has  
6 cited an Oregon appellate court decision that addresses whether  
7 findings that arise out of a proceeding under ORS 20.105 should be  
8 given preclusive effect.<sup>4</sup> With respect to the probable cause  
9 element, I am hesitant to conclude Defendants should be deprived of  
10 their right to a jury trial without the guidance of an Oregon Court  
11 of Appeals or Supreme Court decision. Nor do I believe that such  
12 a determination is necessary at this time, considering (1)  
13 Plaintiff's motion for partial summary judgment is denied on other  
14 grounds and (2) the record before me regarding the Clackamas County  
15 proceeding is quite limited.

16 That said, because amendments should be granted with "extreme  
17 liberality" in order to facilitate decision on the merits, *United*  
18 *States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981), Defendants'  
19 motion for leave to file a first amended answer and affirmative  
20 defense is **GRANTED**.

### 21 ***B. Evidentiary Objections***

22 Pursuant to Rule 12(f), Defendants have moved to strike  
23 various paragraphs in Dierking's supplemental declaration, exhibits  
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25 <sup>4</sup> ORS 20.105 provides that a prevailing party against whom a  
26 claim is brought is entitled to reasonable attorney fees "to be  
27 paid by the party asserting the claim, defense or ground, upon a  
28 finding by the court that the party willfully disobeyed a court  
order or that there was no objectively reasonable basis for  
asserting the claim defense or ground for appeal." OR. REV. STAT.  
§ 20.105(1) (2009).



1 attached thereto, and portions of Plaintiff's reply memorandum.  
2 During oral argument, it was alleged that Defendants' counsel  
3 failed to confer with opposing counsel prior to filing his motion  
4 to strike. Because Plaintiff's counsel was willing to make certain  
5 concessions, the parties were able to agree to rulings with respect  
6 to the following motions:

- 7 • Motion No. 4: Defendants moved to strike Paragraph 12 of  
8 Dierking's supplemental declaration, which pertains to an  
9 itemization of proceedings involving the parties in Oregon,  
10 Maine, Connecticut, and Florida. To the extent Paragraph 12  
11 of Dierking's supplemental declaration concerns litigation  
12 other than that which took place in Clackamas County before  
13 Judge Maurer, Plaintiff has conceded this motion.
- 14 • Motion No. 5: Defendants moved to strike Paragraph 13 of  
15 Dierking's supplemental declaration, which pertains to fees  
16 expended by Plaintiff in an attempt to execute and collect its  
17 judgments entered against Defendants and attorney's fees  
18 incurred by Plaintiff in this case. Plaintiff has conceded  
19 this motion to the extent it relates to litigation taking  
20 place in Florida or Maine.
- 21 • Motion No. 7: Defendants moved to strike a portion of page 6  
22 of Plaintiff's reply memorandum, which references Defendants'  
23 "long history of abusive practices" and the proceedings  
24 involving the parties in Oregon, Maine, Connecticut, and  
25 Florida. To the extent Plaintiff's reply memorandum  
26 references matters other than that which took place in  
27 Clackamas County or the Connecticut investigation into  
28

1 consumer complaints of unfair trade practices, Plaintiff has  
2 conceded this motion.

3 • Motion No. 8: Defendants moved to strike portions of page 22  
4 and 23 of Plaintiff's reply memorandum, wherein Plaintiff  
5 discusses the dismissal of Hoffman's husband from the  
6 Clackamas County litigation and alleges that Hoffman has  
7 transferred assets in order to prevent Plaintiff from  
8 collecting on its judgments. Plaintiff has conceded this  
9 motion, with exception of any reference to expenses incurred  
10 in the Clackamas County proceeding or this case.

11 • Motion No. 9: Defendants moved to strike portions of page 36  
12 and 37 of Plaintiff's reply memorandum, wherein Plaintiff  
13 references legal expenses incurred by Plaintiff and alleges  
14 that Defendants have attempted to shield themselves from  
15 execution on the lien and collection of the Clackamas County  
16 judgments. Plaintiff has conceded this motion, with exception  
17 of any reference to expenses incurred in the Clackamas County  
18 proceeding or this case.

19 • Motion No. 10: Defendants moved to strike footnote 19 of  
20 Plaintiff's reply memorandum, which references the itemization  
21 of proceedings involving the parties in Oregon, Maine,  
22 Connecticut, and Florida. Plaintiff has conceded this motion,  
23 with exception of any reference to expenses incurred in the  
24 Clackamas County proceeding or this case.

25 I turn now to Defendants' remaining evidentiary objections.  
26 Defendants moved to strike two exhibits attached to Dierking's  
27 supplemental declaration, *i.e.*, an appraisal of Plaintiff's  
28 business (Exhibit 3) and information regarding its financial

1 history (Exhibit 4); and paragraphs 6, 7, and 14 of Dierking's  
 2 supplemental declaration. The objectionable material relates to  
 3 Hoffman's husband and the fact that Plaintiff claims its business's  
 4 financial growth was stunted as a result of the counterclaims being  
 5 filed in the Clackamas County proceeding.

6 In short, Defendants' remaining evidentiary objections are  
 7 denied as moot because I either found it unnecessary to rely on the  
 8 objectionable material or the objections raised were duplicative of  
 9 the summary judgment standard itself. *See Ross v. Indep. Living*  
 10 *Res. of Contra Costa*, No. C08-00854 TEH, 2010 WL 2898773, at \*2 n.1  
 11 (N.D. Cal. July 21, 2010) (denying evidentiary objections as moot  
 12 because the court did not rely on the evidence to which the  
 13 objections were lodged); *see also Burch v. Regents of the Univ. of*  
 14 *Cal.*, 433 F. Supp. 2d 1110, 1119 (E.D. Cal. 2006) ("A court can  
 15 award summary judgment only when there is no genuine dispute of  
 16 material fact. It cannot rely on irrelevant facts, and thus  
 17 relevance objections are redundant.")

18 Plaintiff has also objected to exhibits attached to Felstiner  
 19 and Hoffman's declarations on the ground that they "are not, nor  
 20 can they be, presented in a form that would be admissible in  
 21 evidence." (Pl.'s Reply at 17.) Because these exhibits had no  
 22 bearing on my analysis, Plaintiff's objections are overruled as  
 23 well.

#### 24 **IV. DISCUSSION**

25 Under Oregon law, the elements of a claim for wrongful  
 26 initiation of a civil proceeding are as follows:

- 27 (1) The commencement and prosecution by the defendant of  
 28 a judicial proceeding against the plaintiff;

1 (2) The termination of the proceeding in the plaintiff's  
2 favor;

3 (3) The absence of probable cause to prosecute the  
4 action;

5 (4) The existence of malice, or as is sometimes stated,  
6 the existence of a primary purpose other than that of  
7 securing an adjudication of the claim; and

8 (5) Damages.

9 *Roop v. Parker Nw. Paving, Co.*, 194 Or. App. 219, 237-38 (2004),  
10 *rev. den.*, 338 Or. 374, 110 P.3d 113 (2005).

11 The commencement and prosecution element pertains to the  
12 person "who is the primary catalyst for the proceeding and is not  
13 limited to the party who formally initiates it." *Checkley v. Boyd*,  
14 170 Or. App. 721, 737 (2002). Such an understanding "prevents one  
15 who wrongfully uses a civil proceeding . . . from being shielded  
16 from liability merely because that person was not the party who  
17 formally filed the action." *Id.* In the state court proceeding,  
18 the counterclaims were formally commenced on behalf of Sunrise and  
19 Sage Advice. Nevertheless, I agree with Plaintiff that, even  
20 though Hoffman did not formally initiate the proceeding, she was an  
21 active participant which, according to *Checkley*, satisfies the  
22 initiation element. See also Restatement (Second) of Torts § 674  
23 (noting that an active participant is one who "sets the machinery  
24 of the law in motion, whether he acts in his own name or in that of  
25 a third person, or whether the proceedings are brought to enforce  
26 a claim of his own or that of a third person.")

27 Defendants do not contest this assertion. (See Defs.'Mem.  
28 Supp. at 3) ("The uncontradicted evidence in this case is that  
29 defendant Hoffman and her attorneys subjectively believed that  
30 there was a good chance of prevailing on the counterclaims at the

1 time the pleading was filed[.]") Instead, Defendants claim they  
2 have seen no authority establishing that the assertion of a  
3 counterclaim constitutes the commencement and prosecution of a  
4 judicial proceeding. (Defs.' Opp'n at 3.) This argument lacks  
5 merit. According to section 674 of the Restatement Second of  
6 Torts, "one who files a counterclaim to a cause of action initiates  
7 a civil proceeding." Restatement (Second) of Torts § 674 cmt. a  
8 (1977). Because Oregon courts consider the Restatement, "along  
9 with its comments, to be an instructive authority in this area,"  
10 *Roop*, 194 Or. App. at 238 n.12, I conclude that the initiation  
11 element is met. See also ORCP 18 (indicating that asserting a  
12 claim for relief includes asserting an original claim or  
13 counterclaim).

14 The second element is whether the proceeding terminated in  
15 Plaintiff's favor. It appears evident that this element is met  
16 here and Defendants do not argue otherwise.

17 As to the third element, the Oregon Court of Appeals has  
18 stated, "[p]robable cause means that the person initiating the  
19 civil action reasonably believes that he or she has a good chance  
20 of prevailing-that is, he or she has a subjective belief, and that  
21 belief is objectively reasonable." *Pereira*, 230 Or. App. at 674  
22 (internal quotation marks omitted).<sup>5</sup>

23 Plaintiff contends that the doctrine of issue preclusion bars  
24 Defendants from asserting they had probable cause to prosecute  
25

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26 <sup>5</sup> "Whether a defendant had probable cause to initiate a  
27 proceeding is a question of law for the court if the facts or  
28 inferences are undisputed; if the facts are disputed, then a jury  
must decide the facts and the court must instruct the jury what  
facts constitute probable cause." *Id.* at 675.

1 their first counterclaim. The preclusive effect of an Oregon  
2 judgment is described in *Dodd v. Hood River County*, 136 F.3d 1219,  
3 1225 (9th Cir. 1998). Under Oregon law, issue preclusion applies  
4 when:

5 (1) The issue in the two proceedings is identical;

6 (2) The issue was actually litigated and was essential to  
7 a final decision on the merits in the prior proceeding;

8 (3) Defendants had a full and fair opportunity to be  
9 heard on that issue;

10 (4) Defendants were parties in or were in privity with a  
11 party to the prior proceeding; and

12 (5) The prior proceeding was the type of proceeding to  
13 which Oregon courts will give preclusive effect.

14 See *Nelson v. Emerald People's Util. Dist.*, 318 Or. 99, 104, 862  
15 P.2d 1293 (1994) (citations omitted).

16 ORS 43.160 codifies the common law, *Tarlow v. Landye Bennett*  
17 *Blumstein LLP*, 209 Or. App. 171, 174 (2006), and "[b]y the  
18 statute's plain terms, when the face of a judgment or order in a  
19 prior proceeding demonstrates that a matter was actually  
20 determined, the determination is preclusive." *Westwood Construction*  
21 *Co. v. Hallmark Inns*, 192 Or. App. 624, 636 (2002).

22 Here, Plaintiff has not identified, nor has research revealed,  
23 any decision in which an Oregon appellate court decided whether  
24 findings that arise out of a proceeding under ORS 20.105 are to be  
25 given preclusive effect. *Tarlow* provides little guidance here.

26 In *Tarlow*, the defendants moved for summary judgment, arguing  
27 that the doctrine of issue preclusion barred a wrongful initiation  
28 claim because the plaintiff's request for an enhanced prevailing

1 party was denied in a prior ORS 20.190(3) proceeding.<sup>6</sup> *Tarlow*, 209  
 2 Or. App. at 173. The trial court granted summary judgment, ruling  
 3 in a letter opinion as follows:

4 1) Plaintiff's claim of wrongful initiation of civil  
 5 proceedings requires that malice be proven on the part of  
 the defendants.

6 2) That in the prior proceeding . . . [, the court]  
 7 determined that neither plaintiff Oldroyd [n]or her  
 attorneys (defendants in this action) acted in a  
 8 reckless, wilful or malicious manner. This conclusion was  
 reached pursuant to [plaintiff's] request for enhanced  
 prevailing attorney fees.

9 3) The court has examined the Oldroyd case file and  
 10 determined that the issues raised by [plaintiff] in the  
 prior proceedings are the same issues that are the basis  
 11 of this wrongful initiation of civil proceedings case.

12 4) Consequently, this court concludes that the issues in  
 the two proceedings are identical; that the [malice]  
 13 issue was actually litigated and essential to a final  
 decision on the merits in the prior proceedings; that  
 14 [plaintiff] had a full and fair opportunity to be heard;  
 and that [plaintiff] was a party in the prior case.

15 5) This court also concludes [that] the prior proceeding  
 16 requesting enhanced prevailing party fees is the type to  
 which the Oregon courts will give preclusive effect.

17 *Id.* at 174 (alterations in the original).

18 On appeal, the plaintiff argued that the trial court erred in  
 19 applying the doctrine of issue preclusion because the issues of bad  
 20 faith and malice (the fourth element of a wrongful initiation  
 21 claim) were not actually litigated. *Id.* The plaintiff argued, in  
 22 effect, that he did not have a full and fair opportunity to be  
 23

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24 <sup>6</sup> ORS 20.190(3) provides: "[I]n any civil action or proceeding  
 25 in a circuit court in which recovery of money or damages is sought,  
 the court may award to the prevailing party up to an additional  
 26 \$5,000 as a prevailing party fee." Or. Rev. Stat. § 20.190(3)  
 (2009). In making this determination, Oregon courts consider,  
 27 *inter alia*, "the conduct of the parties . . . , including any  
 conduct of a party that was reckless, willful, malicious, in bad  
 28 faith or illegal." *Id.* § 20.190(3) (a).

1 heard on that issue because of the ancillary nature of the ORS  
2 20.190 proceeding, which did not involve the examination of live  
3 witnesses. *Id.* at 175. Because the trial court's grant of summary  
4 judgment was correct on different grounds, the Court of Appeals in  
5 *Tarlow* declined to decide whether findings that arise out of a  
6 proceeding under ORS 20.190 should be given preclusive effect. *Id.*

7 In short, I am not inclined to express an opinion whether  
8 findings that arise out of a proceeding under ORS 20.105 should be  
9 given preclusive effect. This is not an issue which has been  
10 squarely addressed by the Oregon appellate courts, nor has the  
11 record been adequately developed regarding the Clackamas County  
12 proceeding in order to make such a determination. I would rather  
13 reserve the substantive treatment of this issue for a later date  
14 when the record of the court proceedings before Judge Maurer are  
15 better developed in this court.

16 The fourth element of Plaintiff's claim for wrongful  
17 initiation of civil proceedings is "malice, or as is sometimes  
18 stated, the existence of a primary purpose other than that of  
19 securing adjudication of the claim." *Roop*, 194 Or. App. at 238. It  
20 is true "that the law will permit the jury to draw an inference of  
21 malice in most cases where a want of probable cause is found."  
22 *Alvarez v. Retail Credit Ass'n of Portland, Or., Inc.*, 234 Or. 255,  
23 264 (1963). However, "malice, unlike probable cause, is a question  
24 for the jury." *Gustafson v. Payless Drug Store*, 269 Or. 354, 366  
25 (1974); *Erlandson v. Pullen*, 45 Or. App. 467, 478 (1980).

26 Plaintiff argues that the court should find that issue  
27 preclusion bars Defendants from revisiting the issue of malice or  
28 improper purpose. Plaintiff claims "Hoffman's malice or []



1 improper purpose in presenting the wrongful counterclaims, is  
2 identical to the issue confronting the trial court when it awarded  
3 attorney fees pursuant to ORS 20.105(1)." (Pl.'s Mem. Supp. at  
4 19.) I disagree. ORS 20.105 provides that a prevailing party  
5 against whom a claim is brought is entitled to reasonable attorney  
6 fees "to be paid by the party asserting the claim, defense or  
7 ground, upon a finding by the court that the party willfully  
8 disobeyed a court order or that there was no objectively reasonable  
9 basis for asserting the claim defense or ground for appeal." OR.  
10 REV. STAT. § 20.105(1) (2009). ORS 20.105 makes no mention of  
11 malice. Accordingly, Plaintiff's motion for partial summary  
12 judgment is denied on this ground.

13 The last element is that of damage. The legislature adopted  
14 ORS 30.230(1), which provides, "[i]n order to bring a claim for  
15 wrongful use of a civil proceeding against another, a person shall  
16 not be required to plead or prove special injury beyond the expense  
17 and any other consequences normally associated with defending  
18 against unfounded legal claims." OR. REV. STAT. § 30.230(1) (2009).  
19 When the essential elements of a cause of action for wrongful civil  
20 proceedings have been established, the plaintiff is entitled to  
21 recover, *inter alia*, reasonable attorney fees; costs incurred in  
22 defending against the proceedings; and "any other loss of a  
23 pecuniary character that [the plaintiff can prove] resulted from  
24 the initiation of the civil proceedings." Restatement (Second) of  
25 Torts § 681 cmt. d and e; *Pereira*, 230 Or. App. 640 at 675 n.9.

26 Here, Plaintiff "does not seek damages for attorney fees and  
27 costs that were previously awarded . . . by virtue of the [state]  
28 court's Supplemental Judgment." (Pl.'s Mem. at 22.) Instead,

1 Plaintiff "prays for other consequential damages . . . that were a  
 2 consequence of and 'normally associated with' [Plaintiff] defending  
 3 against Defendants' unfounded legal counterclaims." (*Id.*)  
 4 Specifically, Plaintiff claims they "lost time and productivity of  
 5 its CEO in the reasonable and necessary sum of \$4,895.09"; "lost  
 6 staff time in the reasonable and necessary sum of \$182.24"; and  
 7 "expended reasonable and necessary costs for materials in the sum  
 8 of \$355.33." (*Id.*) Plaintiff also seeks \$200,000 in punitive  
 9 damages.

10 Defendants' arguments regarding damages are two-fold. First,  
 11 Defendants argue that Plaintiff's claim for damages fails because  
 12 Plaintiff "has presented no evidence of any legally compensable or  
 13 judicially recognizable loss which [P]laintiff sustained." (Defs.'  
 14 Opp'n at 12.) Second, Defendants argue that Plaintiff was  
 15 adequately compensated for costs incurred as a result of the filing  
 16 of the counterclaims via the enhanced prevailing party fee of  
 17 \$5,500 awarded by the Clackamas County Circuit Court. (*Id.* at 13.)

18 In Oregon, enhanced prevailing party fees are based on the  
 19 consideration of the following factors:

20 (a) The conduct of the parties in the transactions or  
 21 occurrences that gave rise to the litigation, including  
 22 any conduct of a party that was reckless, willful,  
 23 malicious, in bad faith or illegal.

24 (b) The objective reasonableness of the claims and  
 25 defenses asserted by the parties.

26 (c) The extent to which an award of a larger prevailing  
 27 party fee in the case would deter others from asserting  
 28 good faith claims or defenses in similar cases.

(d) The extent to which an award of a larger prevailing  
 party fee in the case would deter others from asserting  
 meritless claims and defenses.

1 (e) The objective reasonableness of the parties and the  
2 diligence of the parties and their attorneys during the  
proceedings.

3 (f) The objective reasonableness of the parties and the  
4 diligence of the parties in pursuing settlement of the  
dispute.

5 (g) Any award of attorney fees made to the prevailing  
6 party as part of the judgment.

7 (h) Such other factors as the court may consider  
appropriate under the circumstances of the case.

8 OR. REV. STAT. § 20.190 (2009).

9 Absent a specific finding under subsection (h), the foregoing  
10 factors do not suggest that parties are compensated for costs  
11 incurred as a result of the filing of claim which lacks probable  
12 cause. That said, although it is a rather trivial amount,  
13 Defendants' own damage expert has stated, "I have reviewed the  
14 declaration that says that Liberty Natural expended \$281.00 in  
15 reasonable and necessary printing costs and \$74.33 in reasonable  
16 and necessary discovery expenses for a total of \$355.33 in material  
17 expenses allocated to the defense of the counterclaims. It is my  
18 opinion that to the extent the corporation can establish the  
19 \$355.33, that would represent a legitimate expense of the  
20 corporation." (Phillips Decl. at 3.) Because these costs would  
21 almost certainly qualify as costs incurred in defending against, or  
22 "other loss of a pecuniary character" that resulted from, Hoffman's  
23 initiation of the civil proceeding, Defendants' cross-motion for  
24 summary judgment is denied on this ground.

25 Although Plaintiff's exhibits demonstrate that they incurred  
26 \$355.33 in costs, Plaintiff has not definitively established that  
27 these costs were incurred as a result of Defendants' filing of  
28 counterclaims, as opposed to the pursuit of Plaintiff's own claims

1 in state court. The parties have also presented conflicting  
2 testimony regarding the legitimacy of the damages Plaintiff  
3 attributes to lost CEO and staff time.

4 In short, there are questions of fact regarding entitlement to  
5 some types of damages and the amount of all claimed damages.

6 **VI. CONCLUSION**

7 For the reasons stated above, Plaintiff's motion (dkt. #33)  
8 for partial summary judgment is **GRANTED** in part and **DENIED** in part;  
9 Defendants' cross-motion (dkt. #51) for summary judgment is **DENIED**;  
10 Defendants' motion (dkt. #72) for leave is **GRANTED**; and Defendants'  
11 motion (dkt. #77) to strike is **GRANTED** in part and **DENIED** in part.

12 IT IS SO ORDERED.

13 Dated this 11th day of April, 2012.

14 /s/ Dennis J. Hubel

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16 Dennis James Hubel  
17 Unites States Magistrate Judge  
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